

Standard™

THE E-DISCOVERY

Applied Discovery's Electronic Discovery Newsletter

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FEATURE STORY

Paralegals Embrace the Benefits of Electronic Discovery

In the past few years, legal issues such as document retention, cost shifting, and spoliation have taken center stage. Yet, as legal professionals around the country rush to master this new area of practice, very little has been written about how electronic discovery actually affects the day-to-day workflow of discovery.

Paralegals and legal assistants—the "case managers" in the document collection and management phase—are perhaps the people most dramatically impacted by the way electronic discovery is changing case workflow. Once the

attorneys have grappled with discovery motions and the dust finally settles, paralegals are left with the job of figuring out just what to do with that mountain of electronic data.

All documents must go through the same processes in electronic discovery as in the paper world—they must be collected, sorted, organized, reviewed, redacted, Bates numbered, and prepared for production. Designing a plan to carry out this work in a new way can be quite a challenge. Attorneys want to review the documents in a simple, efficient way, with the assurance that key

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CASE LAW UPDATES

Email protected by privilege.

Baptiste v. Cushman & Wakefield, Inc., 2004 U.S. Dist. LEXIS 2579 (S.D. N.Y. Feb. 20, 2004).

The court considered a dispute regarding defendant's request for the return of an email allegedly protected by the attorney-client privilege. The first four paragraphs of the email were protected by the attorney-client privilege, even though the email was not authored by an attorney or addressed to an attorney. The email was clearly conveying information and advice by defendant's outside counsel. Nevertheless, the final paragraph of the email, wherein the author was simply conveying to his colleagues his own impressions, was not protected. Finally, the court determined that defendant had not waived the attorney-client privilege with respect to the first four paragraphs of the email. Approximately one month after it learned plaintiff had possession of the email, defendant claimed privilege for the email, and demanded its return less than two weeks later, after examining plaintiff about how she came to possess the email.

The court ordered that all copies of the email in plaintiff's and her counsel's custody and control should be returned to defendant's counsel. The court further ruled that the document should be redacted to reflect the court's decision as to the portions that were privileged, and then produced in redacted form to plaintiff.

Court declines to issue electronic discovery sanctions against defendant.

Aero Prods. Int'l v. Intex Rec. Corp., 2004 U.S. Dist. LEXIS 1283 (N.D. Ill., Jan. 30, 2004).

Plaintiffs in this patent infringement case moved for sanctions related to defendant's alleged electronic discovery misconduct.

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FEATURE STORY (continued from page 1)

documents can be quickly located and will never be overlooked. The client wants to keep costs low and productivity high. While some paralegals are still feeling a bit stunned by all these changes in discovery—and others are still reluctant to accept the notion that anything needs to change—many are embracing the possibilities presented by electronic discovery.

New Opportunities

"Legal assistants already have a recognized expertise in document collection and management," said Andrea Homier, a legal assistant in the Chicago office of Kirkland & Ellis LLP. "With electronic discovery, we can develop a new skill set by understanding how best to collect and organize the review of electronic documents. This enables legal assistants to really add value to the case." Marcus Bell, the Litigation Paralegal Supervisor in the Chicago office of KMZ Rosenman, agrees that the operational aspect of electronic discovery is the most important for paralegals: "Organization is the key to managing documents—whether paper or electronic. The workflow is still essentially the same, but the retrieval and processing stages move much faster. You have to be ready to adapt."

"On the whole, electronic discovery is a really good thing for legal assistants," said Holly Fisher, a senior legal assistant and Homier's colleague at Kirkland & Ellis. "I've handled between 10 and 15 cases where we've utilized electronic discovery technology, and something new happens in each case. Every curve ball that gets thrown provides an opportunity to learn something new about technology and then bring more experience and expertise to your next case."

By developing this kind of competence, paralegals position themselves to provide advice and guidance to attorneys, many of whom are venturing into electronic discovery for the first time. Understanding and then "selling" the workflow benefits of electronic discovery is a process that often originates with the paralegal and flows to the attorney and then to the firm's client.

Workflow Benefits

Speed of document processing and review are areas where paralegals have noticed the most dramatic shift from paper discovery. "There's no doubt that the timeframe for getting the documents ready and online to review is much faster than the preparation stage in paper discovery," said Bell. "The actual review process, including categorizing documents and applying Bates numbers, also moves a lot faster in electronic discovery."

Other case management processes are simplified with electronic discovery. "Documenting the chain of custody and keeping track of who reviewed what and where it came from is much easier with electronic discovery," said Fisher. "Even when we tried printing documents directly from the email files of custodians, it was difficult to track exactly where every document came from once they were all put in boxes." Electronic discovery technology removes the need for manual processes in many of these areas because documents are transferred directly from some form of electronic media—commonly a hard drive, tape, or CD—to the online review application. Eliminating the physical labor of printing and copying documents also eliminates those hard costs that would otherwise be passed directly to the firm's client.

The collaboration between attorneys and paralegals can also be enhanced with electronic discovery. "Summary views of the document sets enable the legal assistant to see how the review project is coming along. We can then help to adjust review assignments where one attorney may have more time than another," said Fisher. "The ability to make annotations on the electronic documents also provides a way for the whole team to communicate about issues that come up along the way."

The benefits of electronic discovery won't be recognized without some advance work, and even those who already have experience say they are still learning. "In hindsight, there will always be things you might do differently next time," said Bell, "particularly in terms of things that we didn't have to think about with paper discovery. Just understanding how electronic documents are different, and adjusting expectations accordingly, is a learning process." Some elements of electronic review—including keeping track of searches that have been run against the document set and managing the number of online document collections—were not a part of paper discovery, and can present unanticipated challenges. "You have to keep an open mind," Fisher agrees, "and know that you will continue to improve your processes with each case."

Getting Started

In order to succeed in this area, paralegals must spend some time in the trenches, learning from their own cases and the situations faced by others in the firm. "First, you should go to your colleagues and find out about their experiences," said Fisher. "Don't be afraid to ask questions to find out who has used which service provider, and how the experience was." Fisher also recommends speaking directly with the service providers, and utilizing their resources to help in the education process before a case is underway.

"It is absolutely critical that paralegals get experience in this area," said Homier. "Don't be afraid to just dive in—the more experiences you get, the better off you will be. Significant challenges will arise, but you will learn from them and advance to the next step."

Bell recommends reading newsletters and doing online research to develop a working knowledge of electronic discovery issues. "Paralegals are always on the front line in understanding how best to collect and manage documents, and they must be able to articulate directly to the attorneys the benefits, the processes, and how to get started with electronic discovery," said Bell. ●

IN THEIR OWN WORDS...

"Applied Discovery continually exceeded our expectations for data loads, both in the initial load of documents, and with repeated 'incremental' and additional loads."

- Associate in AmLaw Top 25 Law Firm | November 2003

Working with Paralegals for Effective E-Discovery

By Michelle Greer Galloway, Esq.,
and Michele E. Moreland, Esq.,
Cooley Godward LLP



Paralegals have long managed the "paper avalanche" of traditional document discovery. They have used database management tools for years to manage data about underlying paper documents and to cull key information needed to present and defend a case. Today, e-discovery can save attorneys, paralegals, and clients time as well as costs, while maximizing the ability to extract key evidence from original documents and benefiting from greater portability of data for the task of document review. Attorneys' fear of losing the ubiquitous binder of key documents makes e-discovery a hard sell to some. Rest assured, e-discovery does not render obsolete the security binder, yet it has some advantages: key data and evidence can be easily found; documents cannot be "lost," and there are potentially huge cost savings.

Create an E-Discovery Plan

Although attorneys are ultimately responsible for e-discovery, paralegals have an invaluable role to play: paralegals manage both the technology—how the data will be collected, reviewed, produced, and accessed—and also how the facts will be "managed" for data extraction. Paralegals should be involved in all aspects of the discovery plan, from helping you manage client expectations to the actual collection, review, and production of documents. Mapping out a plan should begin with the following groundwork:

✓ Get Educated

To help you create the most cost-effective plan, paralegals need to know what the case is about and an overview of the case strategy (e.g., is an early dismissal likely, or should you prepare for a long haul?). Likewise, attorneys need to have a basic understanding of how the client's data is generated, stored, retrieved, and produced. Most paralegals today have prior experience with technology and/or with e-discovery that can be leveraged when formulating the plan. If your paralegal is new to the technology, be sure to involve your firm's IT personnel in strategizing so all parties can learn the basic technology and its capabilities.

Your ability to clearly convey the ins and outs of electronic discovery will help you better manage the client's expectations and increase his or her confidence to invest in the up-front costs associated with e-discovery.

✓ Explore Options

Both paralegal and attorney should explore requirements for the following:

- Purpose and use of e-discovery documents and any resulting database(s)
- Type(s) of database(s), if applicable
- Format of documents (native files vs. non-alterable formats such as TIFF or PDF)
- Full text searching
- Production timelines
- Cost sharing and cost shifting

To some extent, your answers to these questions will be driven by the types of documents and the nature of the case. You must also consider the same questions with regard to documents from the opposing party. A sophisticated database with full text searching capabilities may not be necessary (or cost-effective) for a simple case with a small universe of documents. Conversely, full text searching and a highly structured database can be a huge time and cost saver for a complex case that is likely to generate millions of pages in discovery and not likely to settle early on.

✓ Create a "No Surprises" Budget

Cost—often the most important consideration from the client's perspective—should be discussed with the paralegal so that together you can provide the client with a realistic discovery budget. Frequently the client is given too little information about his or her e-discovery obligations and the cost savings associated with a good up-front e-discovery process. When compiling a budget, keep in mind that there are costs linked with both paper production and with e-discovery.

Considerations may include:

- Types of documents involved—both your client's and the adversary's
- Location of documents (network server, local server, PDAs, home computers, voice mail, e-mail, paper files, etc.)
- Volume of documents (including client archives and backups)
- Remember to include an estimate of processing incoming electronic documents and paper documents from your adversary and/or third parties!

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Michelle Greer Galloway is Of Counsel in the IP Litigation group of Cooley Godward LLP and teaches litigation courses at Stanford and Santa Clara law schools. Michele E. Moreland is an associate in the IP Litigation group of Cooley Godward LLP and is based in the firm's Palo Alto office.

Reaping the Benefits of E-Discovery

Improved Workflow for Attorneys and Paralegals

Dear Miranda,

As the senior associate managing discovery in a government investigation, I'm facing a large document review project with a very aggressive schedule. The lead paralegal on the project has suggested that we use online review for the electronic documents in this case. So far my experience with review has been with paper only. Frankly, with the stakes so high in this case, I'm a bit reluctant to try something new. How do I know when online review is right for a case? How can I best work with the paralegal to be sure the project comes off without a hitch?

Kevin B.
Philadelphia, PA

Dear Kevin,

Many attorneys across the country have asked similar questions before embarking upon their first electronic document review. Their initial reluctance is typically replaced with great relief when the benefits of electronic document review are realized. Online review is beneficial not only from a workflow standpoint, but the technology also enables review teams to avoid costly mistakes that can actually jeopardize a case.

Prior to Data Collection: Pre-Project Planning

At the beginning of the case, the lead attorney and lead paralegal should work together to establish a plan for the project. You must discuss the scope of the project and timelines for document collection, review, and production. A little extra planning at the beginning of the case will greatly improve the workflow throughout the life of the project.

Topics to address in designing project workflow:

- Data collection
 - o Target start date
 - o Target completion date
- Document review workflow
 - o Scope of document review (by custodian)
 - o List of attorneys participating in review
- Production requirements
 - o Document branding (Bates numbers and other stamps)
 - o Document production deadline

With the workflow plan in place, the attorney and paralegal can work in tandem to usher the project through to production.



Attorneys and paralegals manage large-scale review faster and easier with e-discovery.

Practical Benefits of E-Discovery Over Paper *Collect and Store Data with Ease*

We're all familiar with the problems associated with the logistics of managing paper during document review. When all the documents are collected and copied for a large case, you can have 5,000 to 10,000 boxes of documents. The space alone required to store and sort through the documents is costly and burdensome. Gathering, copying, and organizing all those paper copies can take weeks or even months.

Electronic discovery provides a way to avoid the difficult logistics of large-scale document review. The data collection process is still detailed and thorough, but electronic files are faster to copy, significantly more portable, and can be gathered in a fraction of the time. Obviously they also require considerably less room for storage.

Create a Traceable Document Trail

Once gathered, paper documents must be copied, tracked, sorted, reviewed, filed, etc. In order to effectively handle the volume of paper in a large case, a whole team must be dedicated to moving the documents through the review process.

Unfortunately, stories of lost documents, misplaced boxes, and documents misfiled into the wrong collections are not uncommon. The consequences can be simply annoying—time wasted searching for a misplaced document, or even disastrous—a privileged document misfiled and eventually produced to the opposing party.

Managing documents electronically also enables the team to track the process electronically. Using mouse clicks to move documents from one collection to another eliminates the physical labor

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IN THEIR OWN WORDS...

"The Applied Discovery review interface is far superior to others I have tested and used."

Associate in AmLaw Top 50 Law Firm | November 2003

Designing a Document Review and Production Strategy

By Bethany DeRuiter, Morrison & Foerster, LLP

You've collected data from the client. You've selected your e-discovery service provider, and the data has been processed. You've mapped out production deadlines. The data is now ready to be reviewed by the attorney review team.

As the document manager for the case, the legal assistant or paralegal can facilitate an efficient and seamless review process by following these steps:

1. Design the Online Review Process. First, meet with the managing attorney to determine the most important issues, facts, and other criteria that the reviewers will need to track during the review process. Next, meet with your service provider and orient yourself to the functionality of the particular review tool. The paralegal case manager is uniquely positioned to bring together the factual elements of the case and the functionality of electronic discovery technology to most effectively leverage the firm's resources for a successful project.

2. Prepare an "Electronic Review Orientation" Binder. To give the reviewing attorneys an overview of the case, and to manage their expectations of document review, you should prepare and distribute a binder of summary case materials. This binder of reference materials will typically include the following:

- Chart of custodians ("Cast of Characters"). Be sure to include names; titles or positions; type of data collected (paper files, email, electronic files, interview notes); volume of data; and priority of custodian. See sample in fig. 1.
- "Electronic review checklist." Your checklist should include names of custodians; volume of data; attorney assigned/date file complete; second level review attorney assigned/date file complete; deadline for review; date produced; Bates ranges assigned. See sample in fig. 2.
- Summary memo of the case (prepared by attorney).
- Copies of document requests.
- Team "contact sheet" including your client's and the firm's IT contacts; key service provider contacts; and the usual list of counsel.
- Service provider's user manual.
- Memo on "What is a Hot Doc?" (prepared by attorney).
- Document production log.
- Discovery "newsletters." Typically created by attorneys and legal assistants and emailed to the review team with answers to questions about sensitive issues and special documents.

3. Facilitate Attorney Online Review Tool Training. Set up training sessions for your firm's attorneys to be conducted by your service provider.

Training should include logging in, opening documents, saving documents to folders, designating responsive documents for production, making annotations, redacting, and logging out.

A preliminary training session should be conducted with the attorney managing discovery and the lead paralegal. This preliminary session will give you a head start on how the online review program works so you can assist with troubleshooting during the review. This will also give the service provider an opportunity to learn which features of the review tool will be most helpful to your particular case, in order to emphasize those features during the formal training session.

Fig. 1 Chart of Custodians:					
Priority	Name	Title/Position	Type of Data Collected		Volume of Data
High	John Richardson	VP Sales	Email	<input checked="" type="checkbox"/>	
			Paper files	<input checked="" type="checkbox"/>	
			Electronic files	<input checked="" type="checkbox"/>	
			Interview notes	<input checked="" type="checkbox"/>	
Priority	Name	Title/Position	Type of Data Collected		Volume of Data
High	Lisa Wood	VP Operations	Email	<input checked="" type="checkbox"/>	
			Paper files	<input checked="" type="checkbox"/>	
			Electronic files	<input checked="" type="checkbox"/>	
			Interview notes	<input checked="" type="checkbox"/>	

Fig. 2 Case:	
Custodian name:	James Richardson
Volume of Data	4 gigs
Attorney Assigned/Date File Complete	Julie Burns 1/14/04
Second Level Attorney Assigned/Date File Complete	Sam Thompson 3/17/04
Deadline for Review	4/15/04
Date Produced	4/17/04
Bates Ranges Assigned	DEF10082-DEF12044

Next, set up a training session with the entire review team. This training session will enable the managing attorney to offer case-specific information that may relate to the particular features of the review software (e.g., a brief discussion on privileged issues may be interjected during the description of the redaction feature). During this session, you will also have an opportunity to offer tips to the reviewers on specific searches and other procedures to ensure consistency in the review process; describe the long- and short-term goals set by the managing attorneys for the review and production; and review the priorities based on those goals.

Bethany DeRuiter is a senior legal assistant at Morrison & Foerster, LLP in San Francisco. She has managed large cases for attorneys for more than 18 years.

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Applied Discovery Named "Product of the Year"



Sean Bell

LexisNexis Applied Discovery
Director of Product Management

This issue's Spotlight column features an interview with Sean Bell, Director of Product Management at Applied Discovery. Sean oversees product planning for Applied Discovery's Online Review Application.

The E-Discovery Standard (EDS): Sean, it seems congratulations are in order—Applied Discovery received two awards at New York LegalTech in February.

Sean Bell (SB): We were honored to receive awards in two categories. First, we were thrilled to be named 2003 Electronic Data Discovery System of the year, as this is a testament to the hard work we've put in to ensure that our product offering truly meets the electronic discovery needs of our clients. The big news for us, though, was being named overall 2003 Product of the Year. This category included everything from time and billing programs, to other electronic discovery services, to the very popular BlackBerry wireless email system.

EDS: That's fantastic news for the company and its clients. How were the award winners selected?

SB: In October 2003, the editors of Law Technology News® asked the publication's 40,000 subscribers to select products and vendors that represented outstanding achievement in 13 categories of legal technology. Ballots were bound into all copies of the magazine and delivered to LTN's audience of law firm partners, legal administrators, MIS/IT directors and specialists, corporate counsel, litigation support specialists, and other legal professionals. Winners were determined based on the most-mentioned products/company in each category.

EDS: What do the awards mean to the company?

SB: First of all, we think it is significant that the electronic discovery industry has grown to the extent of being selected for its own category, when just 13 categories were available. The market known as "electronic discovery" has been around for only about the past five years. The growth of the industry in that timeframe is astounding. Not only has the demand for technology services grown, but the body of case law has developed at a rapid rate as well.

associated with managing document review, and removes the cost of bringing teams of people to one physical site for review. Keyword searches and electronic reports enable the case manager to perform high-level quality control measures, ensuring no documents are overlooked or inadvertently produced.

Eliminate Coding Sheets

In paper document review, many teams still use paper coding sheets. The attorney reviewers handwrite notes directly onto the coding sheets for each reviewed document. Paralegals or legal assistants then typically compile the handwritten notes into some centralized place. Storage for these critical case notes is often as unsophisticated as a simple spreadsheet. The challenges in reading the handwriting, ensuring that all the notations are attached to the correct documents, and compiling the information into a usable form can be aggravating and error-prone.

Electronic document review relieves attorneys and paralegals of the burden of coding sheets altogether. With online review, all aspects of the document review are tracked electronically. From the beginning, the documents are categorized by custodian. Attorneys can then classify documents in one or more "folders" or collections. Annotations made electronically are "attached" directly to the document. Documents are always available at the reviewer's fingertips, and the possibility of losing or misplacing a document is a thing of the past.

Produce with Confidence and Ease

In paper review, once the review process is finally complete and the coding sheets have all been compiled, preparing the documents for production can be very time consuming and tedious. The entire production set must be sent to a vendor for Bates numbers and other stamps, then finally prepared for copying—another step that can take weeks or months in a large case.

Electronic discovery makes it possible to produce large volumes of documents within a matter of hours or days. Users have the ability to Bates number and stamp the documents directly from one interface. Production options include printing the documents to a local or network printer from within the application, saving the files to produce them electronically, or having the service provider take care of the details for you.

Conclusion

Electronic discovery gives attorneys the tools to be more thorough in their document review while minimizing the room for human error. For paralegals, many of the tedious details of logistics surrounding discovery are eliminated altogether. Take the paralegal's advice in this case—you'll find that it truly is safer, faster, and easier to review electronically. ●



Miranda Glass is Educational Programs Manager at Applied Discovery. She answers questions from readers in each issue of **The E-Discovery Standard**. You can submit a question to her at miranda.glass@applieddiscovery.com.

Second, and even more important, is that this recognition comes directly from the people who are out there in the law firms and corporations dealing with electronic discovery issues on a daily basis. The fact that the award recipients were selected by practitioners—not a trade association or industry group—is the most important thing in our minds.

EDS: As Director of Product Management, from what sources do you gather information to ensure that your product plans match the needs of your clients?

SB: We gather information in a number of ways. Of course we talk to our clients on a daily basis, and we live through the trials and tribulations of electronic discovery side-by-side with them. We learn something new from nearly every case, and we take key learnings on to the next project, and so on. From the beginning, we have also worked with government agencies such as the FTC, the DOJ, judges, attorneys, paralegals, and other industry thought leaders to ensure that the vision of the product we map out on paper matches their day-to-day workflow needs. We are proud of the product we have developed based on that feedback, and happy to learn that our clients appreciate it, too.

EDS: What do you think sets Applied Discovery apart from other electronic discovery providers, placing the company in a position to receive awards like this?

SB: Based on the feedback we get from our clients, I would say the two biggest factors are our client service standards and the ease of use of our product. Electronic discovery is a crucial element in litigation and government investigations—any case involving the review of large sets of documents. The stakes are high in these situations, and our clients need to be able to rely on their service provider to help them through the process. Each of our clients has a dedicated Account Manager responsible for every project related to that client, ensuring one consistent point-of-contact for training, service, and support. Our Account Managers are attorneys, paralegals, and technical specialists. Our clients benefit from this approach because a direct, professional relationship is formed.

As for our product, we are committed to providing the reliability and functionality that our clients need, but we work hard to make sure it doesn't become too complicated. Our user interface is so simple that clients typically begin reviewing documents with less than an hour of training. Many attorneys are still a bit reluctant to try new technologies, but the ease-of-use of our product wins them over, time and time again. ●

IN THEIR OWN WORDS...

"We have been very pleased with Applied Discovery's speed, responsiveness, and professionalism and appreciate the steps taken to help us achieve our production goals."

- Associate in Texas Litigation Boutique | July 2003

Implementing The E-Discovery Plan

Establish a dialog between your paralegal and the client early in the case to help facilitate the collection effort. Conveying your confidence in your paralegal will also reassure the client, help your paralegal assume stewardship of the collection effort, and shift the day-to-day collection and production issues to the paralegal. The attorney must stay apprised of the client's e-discovery compliance and be able to address legal issues that may arise as a result.

It is also important to involve your client's—and generally, your firm's—IT personnel. Paralegals experienced in e-discovery will seek out a contact in the client's IT department to establish a dialog between that individual and your firm's IT personnel to ensure that everyone is on the same page.

✔ Data Collection

You and your paralegal must have a game plan for data collection from the start. Document collection procedures are commonplace in hard copy productions; the same applies for e-discovery. Before data collection begins, you should institute procedures for preserving electronic files. To avoid inadvertent loss of evidence, be sure that data is not being deleted or saved over. With your paralegal, prepare collection interview questions to ascertain if and where electronic information may be stored. Be sure to include PDAs, home computers, email archives, voicemail, and other e-systems as potential sources of evidence.

Keep your paralegal informed as the case progresses and as facts and issues change (e.g., the client may "forget" a witness or some relevant facts). A paralegal who knows the case well often can identify additional individuals from whom documents should be collected. Make sure your paralegal has enough information to spot issues and follow up leads.

As with paper production, it is important to track with a chain of custody the how, when, where, and why of the production. The same effort should be made with respect to electronic collections to deal effectively with challenges to the production or the authenticity of documents produced; to create a trail for a 30(b)(6) custodian of records deposition; and/or to defend the scope and quality of the collection and production during motion practice.

✔ Data Review

Before reviewing the documents, work with your paralegal to establish procedures for dealing with special documents. E-discovery permits

identification of the universe of relevant documents, avoiding inadvertent production of non-responsive or privileged documents before numbering and coding. Non-privileged, responsive documents can then be reviewed from any location with computer access and issue coded or annotated directly by attorneys during the review.

Most attorneys and paralegals have a practice for dealing with privileged documents (and documents subject to third-party confidentiality agreements) that covers paper or electronic production. Electronic review presents certain advantages when dealing with privileged documents:

- Ease of document search for indicia of privilege as a first cut (be sure to include obvious misspellings of attorneys' names in the searches)
- Real-time redaction during the review and consistency in redaction
- No loss of original un-redacted documents

Electronic review also enables you to monitor the progress of the review so you can proactively address delays.

✔ Data Production

It is advisable to produce in a standard, non-alterable format, such as TIFF or PDF images burned to a CD. Some parties now routinely request production of images in a searchable format. In cases where subsets of the same documents are being produced in multiple litigations, consider a web-based production, in which each adversary accesses—with a secure password—a website displaying the documents each party is entitled to view.

Advice for Paralegals

Learning about e-discovery can make you an invaluable resource not only to your immediate team but also to your firm as the use of e-discovery is employed on projects for more clients. Take initiative when sharing your e-discovery experience so that others may learn from you, and you will soon be recognized as an expert within the firm.

For each case, your team needs to understand how to access the e-discovery database and its capabilities. Educate attorneys about how the documents were collected and processed so that questions about the production can be dealt with in ad hoc situations—at a hearing, on a motion to compel, or during a deposition. Help attorneys avoid client relation problems by keeping them apprised of collection delays or complications; unforeseen costs; production delays; or unanticipated technology issues. Likewise, quantifiable cost or fee savings should be calculated and communicated to the attorneys so they may relate the "good news" to the client.

Conclusion

Attorneys can no longer look at electronic documents and simply conclude: "Let's convert it to paper and process as usual." There are notable differences between conventional paper document production and e-discovery. Paralegals have significant knowledge of database management and fact extraction from the conventional process. Keeping them in the loop and listening to their advice can help you leverage that experience to drive successful, cost-efficient e-discovery. ●

IN THEIR OWN WORDS...

"Applied Discovery's online review application is stable and user friendly. There's never a question about service—we get what we ask for!"

- Litigation Support Manager at AmLaw Top 50 Law Firm | October 2003

How to Safely Copy Data for Use in E-Discovery

The managing attorney for a large litigation receives a worried email from one of the members of her review team. It appears that all the "date modified" fields for the documents are dated the same. Even worse, the date indicates all the documents were "modified" just a few weeks ago, instead of during the time period relevant to the client matter. Given opposing counsel's request that all meta data be preserved, this could be a serious problem. A few phone calls later, the nightmare becomes clear: data gathered for review was inadvertently manipulated, leading to false "date modified" meta data. The managing attorney's options are limited to re-collecting the data, an onerous and expensive task, or going, hat-in-hand, to opposing counsel and the judge to explain the gaffe.

Sound familiar? We hope not. However, the issue of accurately and safely collecting data is one that causes much angst with any attorney involved with an electronic discovery project. The fear of data alteration is real: such mishaps can subject a party to spoliation sanctions.

Data collection is an issue that clearly demonstrates the old adage of "garbage in, garbage out." Far too many attorneys struggle through electronic review because a few important steps haven't been followed early in the case.

It's best to consult a data collection specialist before undertaking this task. In some cases, actual collection by the specialist may be the most prudent course. In other cases, the law firm or corporate IT staff can accomplish the work with some well-placed guidance. Below are a few simple steps to keep in mind to ensure that technical issues such as bad data collection don't compromise your case. These guidelines are designed to provide attorneys with the steps necessary to have non-experts accurately capture "active files" for review.

A note of caution: In most cases, forensic work is not required. However, if it is required, please note this advice is not intended for conducting a forensic exam.

Steps to follow:

1. Choose a copying mechanism that works best for the case at hand. There are two major methods for safely copying data from a computer hard drive to transportable media:

- Create a "non bit stream" image:** This approach copies ALL active files on the hard drive without any relevant meta data changes—often referred to as "ghosting" the hard drive because of the well known Symantec product, Norton Ghost.

Advantages: This approach is an excellent archival mechanism, particularly when an attorney believes that, down the line, there may be other active files he or she may want to review. As this approach captures all active files, going back for additional data is easy.

Disadvantages: First, you are capturing ALL active files, including system files (e.g., executable files, .dlls, etc.), so you'll need to search through all the unusable files to find the data you're interested in. Second, because most service providers will need to restore the entire backup, it often takes longer to upload the data, slowing the time it takes to actually start reviewing the documents.
- Copy selected data:** This approach allows users to just copy over selected files or folders. Once again, there are several software products available that enable users to copy data, one of the most well known being Microsoft's Robocopy (an administrative tool bundled with Microsoft Windows NT/2000/XP Resource Kit).

Advantages: Almost every IT organization has Robocopy because it's included in the Windows Resource Kit. It also can cut down on the amount of useless system files you copy over by allowing you to control what is copied and, if used correctly, it doesn't affect the file's meta data.

Disadvantages: Selectively copying data can be dangerous if the steps below aren't followed. You'll also need to go back to the custodial source again if you miss data that, later on, you wish to review.

2. Avoid common pitfalls. While the two approaches are relatively straightforward, there are other issues to keep in mind:

- Don't do a "Windows copy":** Often referred to as the common "copy/paste" mechanism or the "drag and drop" mechanism for copying data, this approach is one of the most common causes of data spoliation. When making a copy in this way, Windows treats the copied documents as "new" documents. Thus, the "date created" field for the copy will be completely different from the "date created" field for the original document.
- Don't open the original when checking for relevance:** Untrained data collectors will often open the original documents to check for relevance before copying them over. This, of course, can change the "date modified" field even if nothing is changed in the original itself. The best approach to checking a file is to right click on the document without opening it, choose "copy" and then paste the copy into another folder. This way, you can look at the copy for relevance. If it's relevant, you can copy the original without opening it and by using software (such as Robocopy) that also won't alter the "date created."
- Double check how the actual CD/DVD-burning software handles dates:** During the "burning" process (i.e., when the files are actually copied to the CD/DVD), some of these software packages may take one date (e.g., the date created) and apply that to the other date fields. If that's the case, you'll want to use different software or check to see if the default process can be changed.

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Finally, this session will provide the opportunity to distribute assignments of document groups to review based on the established priorities.

At this stage, it is essential to ensure that the attorneys and the service provider know that you are the point-of-contact for communicating and streamlining any changes in the review process for the entire project. After notifying your firm's team of your role, you will be ready to receive and document any changes in the "Orientation Binder" or communicate those changes via email to the entire review team in a timely manner.

4. Prepare a Document Production Checklist.

When the attorney review team has completed their examination of the assigned section, folder, or group of documents, and you are ready to produce, prepare a step-by-step plan of your requirements for production:

- Run queries to collect the documents for production into one folder (e.g., all responsive documents since the last production, or all documents reviewed and marked responsive in a custodian's folder). Note: It is very important that your queries for collecting documents for production exclude any privileged documents. You may also want to build in some time for conforming the designations of privileged and redacted documents to other "copies" or versions of the same documents that appear in the larger collection or database. This ensures consistency in your production and designations. This is one of the greatest benefits to using an online review tool—it is almost impossible to do this sort of cross-referencing in a paper review.
- Apply Bates numbers to documents in the collection.
- Determine the production method (e.g., CD or DVD).
- Verify the inclusion of all fields agreed upon by opposing counsel in the data load file (e.g., images, Bates ranges, OCR, source field) and instruct the service provider to prepare disks for production to opposing counsel.

5. Coordinate Loading of Data from Service Provider to In-House Databases. Depending on the nature of the case and other pertinent factors, you may want to load the data into your in-house database before producing to the opposing counsel. If so, ask the service provider to deliver to you a data load file containing images and all of the metadata from the production set defined at the beginning of the case. The fields included in the data load will be mapped to the previously defined database fields. For maximum flexibility, you may want to ask for two sets of data load files: one for your in-house database, containing all images and

metadata, and another for production to counsel, containing images and only selected metadata fields.

You may also want to ask the service provider to provide a data load set of all of the privileged documents that have been designated through the current production. In some cases, privilege logs must be provided concurrently with the documents produced. In those cases, it will be important to have the data from the privileged documents loaded as quickly as possible into your in-house privileged document database in order to facilitate your preparation of a privilege document log.

With a clear plan for review, attorneys and legal assistants can work together with the service provider to efficiently navigate through immense volumes of data. The degree to which you pre-plan your document review and production strategy is directly proportionate to the degree of confidence you will enjoy as you move through the production process. ●

In February 2003, plaintiffs learned that defendant had been deleting all of its emails every 30 days since the case was filed in April 2002. On April 1, 2003, a protective order was entered requiring defendant to make a full and complete effort to recover any and all deleted electronic documents, including email. The order also stated that plaintiffs could petition for the appointment of a computer forensics expert to assist in recovering electronic data, and could request that defendant bear the costs of this computer forensics expert.

In May 2003, defendant produced 45 pages of documents. Defendant also produced a declaration from a computer forensics specialist that described defendant's efforts to retrieve the destroyed emails. In particular, defendant searched a certain type of file on selected computers. Plaintiffs found these submissions unacceptable; thereafter, the parties engaged in negotiations to hire a computer forensics expert. These negotiations ultimately proved fruitless. At no time did plaintiffs file a petition seeking the appointment of a computer forensics expert.

Plaintiffs moved for discovery sanctions pursuant to FRCP 37(c)(1) and 37(b)(2)(A). Plaintiffs asserted that defendant failed to comply with the April 1, 2003 order regarding electronic discovery. The court denied the motion, finding that plaintiffs failed to file a petition, as was their right under the April 1, 2003 order, to seek the appointment of a computer forensics expert to assist in recovering electronic data. The court determined that an award of sanctions would be unjust because plaintiffs waited over seven months to file the discovery motion and bring the matter before the court. ●

TECH TIPS (continued from page 9)

- Test, test, test: Untrained data collectors will frequently not take the time to double check to make sure there aren't any obvious errors in their copies. The easiest thing to check are the three "date fields" (date created, date modified, and date accessed) to make sure the copied data's meta data was accurately carried over from the original files.
 - Right click the "My Computer" icon and choose "Explorer."
 - Find the drive letter for the media holding the copied data, and click it. A list of all the files on that media should appear.
 - Click "View" in the top menu and choose "Details," the default view. The columns in the window where all the files are located should now show several fields, including "name," "size," "type," and "date modified."
 - Right click the column headings. A list of other column headings appears. Click "Date Created" to have that column appear. Then click "More" at the bottom of the list. All the options will appear and you can add "Date Accessed" as well.
 - Compare the information listed in column headings for any obvious problems (e.g., all the "date created" meta data is consistent and is on the day you created the copy of the originals).

Ideally, a data collection specialist could help you with every case involving electronic documents. Realistically, however, many situations will call for data collection by "non experts." In these situations, it's critical that everyone follow the few key steps above to ensure your review focuses on the legal issues at hand instead of the technical ones. ●



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...to our clients and colleagues for naming LexisNexis™ Applied Discovery® as the **Electronic Data Discovery System of the Year** and the overall **Product of the Year** at the Law Technology News Awards® at LegalTech New York in February.

We'll continue to work hard in 2004 to earn your trust and business.

In this issue: Special paralegal focus.

FEATURE STORY: "Paralegals Embrace the Benefits of Electronic Discovery," **See Page 1**

GUEST ARTICLE: "Working with Paralegals for Effective E-Discovery," by Michelle Greer Galloway, Esq., and Michele E. Moreland, Esq., Cooley Godward LLP. **See Page 3**

PRACTICE TIPS: "Designing a Document Review and Production Strategy," by Bethany DeRuiter, Morrison & Foerster, LLP. **See Page 5**

UPCOMING EVENTS

Applied Discovery will participate in the following events in the coming months. Please contact us to register or to request more information. For information about other electronic discovery events, visit the News & Events section of our website at www.lexisnexis.com/aplieddiscovery.

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■ **DRI: Electronic Discovery Seminar**
The Westin New York at Times Square
April 29-30, 2004

■ **ABA Section of Litigation: 2004 Annual Conference**
The Phoenician | Scottsdale, AZ
May 5-8, 2004

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■ **Mealey Publication Conferences: Role of Paralegals in Mass Tort Litigation**
The San Diego Marina Marriott
May 10-11, 2004

■ **Mealey Publications Conferences: E-Discovery Conference**
The Ritz-Carlton Hotel, Pentagon City | Arlington, VA
June 17, 2004

JUNE						
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■ **Mealey Publications Conferences: E-Discovery Conference**
The Hotel Crescent Court
Dallas, TX
June 22, 2004

APPLIED DISCOVERY IN THE NEWS

You may have read about Applied Discovery recently in the following publications. Please contact us to request a copy of these articles, or view them online at www.lexisnexis.com/aplieddiscovery.

"Tech Firms Cash in as Lawyers Plug In"
USA Today
March 10, 2004

"Ready to Rumble"
American Lawyer
February 2004

"The Brave New World of Electronic Discovery,"
by Mag. Judge John M. Facciola, D.D.C.
Federal Courts Law Review
February 19, 2004

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